

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



# 75-1430

To be argued by  
PHYLIS SKLOOT BAMBERGER

B  
P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
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:  
UNITED STATES OF AMERICA,  
:  
:  
Plaintiff-Appellee,  
:  
:  
-against-  
:  
:  
JAMES GRANT,  
:  
:  
Defendant-Appellant.  
:  
:  
-----X

Docket No. 75-1430

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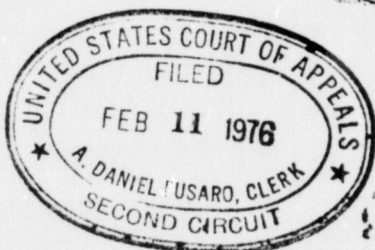
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APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
JAMES GRANT  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,  
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT

D. C. Form No. 100 Rev.

JUDGE METZNER 75 CRIM. 922

TITLE OF CASE  
THE UNITED STATES

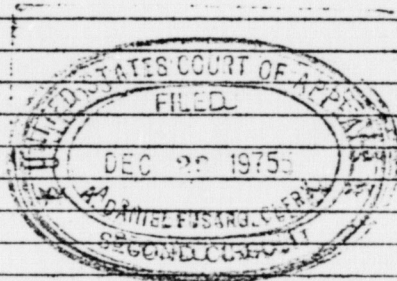
ATTORNEYS

For U. S.:

JAMES GRANT

vs.

Paul Vizcarrondo, Jr., -AUSA  
791-0006



For Defendant:

William Mogulescu, Esq.  
299 B'way  
New York, N.Y.

(07)	STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
	J.S. 2 mailed	Clerk				
	J.S. 3 mailed	Marshal				
	Violation	Docket fee				
	Title 21 & 18					
	Sec. 812, 841, (a)(1), (b), 924(c)(1),					
	Distr. & possess. w/intent to distr. Cocaine, IL (Cts. 1-5)					
	Use of firearm to commit a felony. (Cts. 6-10) (Ten Counts)					

DATE	PROCEEDINGS
8-17-75	Filed indictment. (Superseding 75CR400 and referred to Metzner, J.).
09-24-75	Filed govts. memorndum of law in opposition to defts. motion for severance.
09-24-75	Filed defts. request to charge.
9-24-75	Filed govts. request to charge.
09-22-75	Jury impaneled and sworn, trial begun.
09-23-75	Jury trial contd.
09-24-75	at 1 " and concluded. Deft. guilty on ct. 1, 2, 3, 4, possession only, NOT GUILTY on ct. 5; and GUILTY on cts. 6, 7, 8, 9 & 10. PSI ordered. Sent. adj. to Oct. 15, 1975. Bail increased to \$35,000 cash or surety. Present bail contd. until 12 noon, Sept. 26, 1975. Metzner, J.

(initials)

A

DATE	PROCEEDINGS
09-24-75	Filed order--Deft. moves to sever cts. 6 through 10 of the indictment. Motion is denied.,etc. as indicated. So ordered, Metzner, J. m/n
10-15-75	FILED JUDGMENT--(atty. Wm. Mogulescu present)--the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of TWO & A HALF (2½) YEARS on each of cts. 2,3,4 to run concurrently with each other. Pursuant to Title 21, USC, Section 841, the deft. is placed on Special Parole for a period of THREE (3) YEARS on each of cts. 2,3 and 4 to run concurrently with each other and to commence upon expiration of confinement. SIX MONTHS (6) on ct. 1 to run concurrently with the sentence imposed on cts. 2,3 & 4. TWO & ONE HALF (2½) YEARS on each of cts. 6,7,8,9 & 10 to run concurrently with each other and to run concurrently with the sentence imposed on cts. 2,3 & 4. Bail pending appeal is fixed at \$35,000 cash or surety. Metzner, J. (copies issued)
10-24-75	Filed defts. affdt. and notice of appeal to the USCA from the judgment of Oct. 15, 1975. (copies mailed to AUSA and to Medical Center for Federal Prisoners, Springfield, Missouri 65802.

A TRUE COPY

RAYMOND F. BURCHETT, Clerk

By M. H. T.

Deputy Clerk

B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

75 CRIM. 922

----- x  
UNITED STATES OF AMERICA :

-v- :

JAMES GRANT, :

Defendant. :

INDICTMENT

S 75 Cr.

----- x  
COUNTS ONE THROUGH FIVE

The Grand Jury charges:

On or about the 22nd day of January, 1975, in the Southern District of New York, JAMES GRANT, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute Schedule II narcotic drug controlled substances, to wit, cocaine, as hereinafter set forth in Counts One through Five of this Indictment:

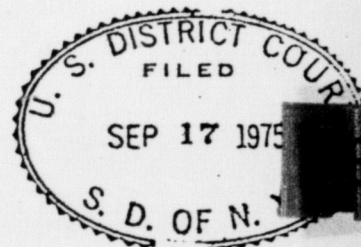
<u>Count</u>	<u>Schedule II Narcotic Drug Controlled Substance</u>
1	5.38 grams of cocaine
2	3.03 grams of cocaine
3	226.26 grams of cocaine
4	178.45 grams of cocaine
5	27.57 grams of cocaine

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNTS SIX THROUGH TEN

The Grand Jury further charges:

On or about the 22nd day of January, 1975, in the Southern District of New York, JAMES GRANT, the defendant, unlawfully, wilfully and knowingly, did use the firearms hereinafter set forth in Counts Six through Ten to commit felonies for which he may be prosecuted in a Court of the



MICROFILM

SEP 18 1975

PV, Jr.:ka  
75-0310

United States, to wit, the felonies set forth in Counts One through Five of this Indictment:

<u>Count</u>	<u>Firearm</u>
6	Dan Wesson .357 magnum revolver.
7	Winchester model 94, 30-30 cal. rifle.
8	Remington .45 cal. semi-automatic pistol.
9	Plainfield .30 cal. semi-automatic rifle.
10	Sturm Ruger .357 magnum revolver.

(Title 18, United States Code, Section 924(c)(1).)

Albert O. Castelli  
FOREMAN

Paul J. Curran  
PAUL J. CURRAN  
United States Attorney

22

ict Court  
EW YORK  
AMERICA

JUDGE METZNER

9/17/75 Filed indictment. Case is referred immediately to Judge Metzner as a related case (75 Cr. 400)

Duffy J.

SEP 22 1975

Jury impaneled and sworn, trial begun.

Metzner J.

SEP 23 1975

Trial continued

Metzner J.

SEP 24 1975

Trial continued and concluded  
Defendant guilty on count 1 - possession only. Guilty on 2 } possession with  
3 } intent to  
and 4 } distribute.  
Not guilty on count 5.

Guilty on counts 6-7-8-9-and 10.

F.S.I. ordered. Sentenced Oct. 15, 1975.

Bail increased to \$35,000.00 cash or surety  
Remot bail continued until (over)

iant.

T

§ 924(c)(1))

CURRAN  
os Attorney.

Foreman.

Mr. J. S.

OCT 15 1975

for sentencing  
the defendant with his atty (see attached)

USA  
v  
JAMES GRANT

75CR.922

SENTENCE

Two and a half ( $2\frac{1}{2}$ ) years on each of counts 2-3 and 4 to run concurrently with each other. Pursuant to Title 21 U.S.C. Section 841, a three (3) year special parole on each of counts 2-3 and 4 to run concurrently with each other and to commence upon expiration of confinement.

Six (6) months on count (1) to run concurrently with the sentences imposed on counts 2-3 and 4.

and  
Two and a half ( $2\frac{1}{2}$ ) years on each of counts  
6-7-8-9 and 10 to run concurrently  
with each other and concurrently with the  
sentences imposed on counts 2, 3 and 4.

Wagner, J.

Bail finding appeal fixed at  
\$35,000.00 cash or surety

Defendant advised of his right to appeal. Oral  
motion to exonerate defendant from the \$25,000.00

U.S.  
v  
Grant

1 gtal

2 CHARGE OF THE COURT

3 (Metzner, J. )

4 THE COURT: Mr. Joseph, ladies and  
5 gentlemen of the jury:

6 We have now reached the point in this  
7 trial when you are about to enter upon your final func-  
8 tion as jurors, which is, of course, one of the sacred  
9 duties of citizenship.

10 You have given careful attention to the  
11 evidence during the course of the trial and I am certain  
12 that you will conduct your deliberations in the same  
13 fine spirit that you have so far displayed and with im-  
14 partiality and fairness reach a just verdict in this  
15 case.

16 In our court system the functions of the  
17 judge and the functions of the jury are clearly de-  
18 fined. It is my duty to instruct you as to what the  
19 law is; it is your duty to accept the law as I state  
20 it to you. Just as I am the exclusive judge of the  
21 law, so you are the exclusive judges of the facts.  
22 You alone determine the credibility of the witnesses  
23 and the weight, effect, and value that should be given to  
24 their testimony. It is up to you to determine from  
25 the evidence which you have heard what the facts are

1 gta2

2 in this case, and from those facts decide whether the  
3 defendant has violated the law.

4 This is a criminal prosecution in which the  
5 government is one party and the defendant is the other.  
6 The fact that the government is a party entitles it to  
7 no greater and to no lesser consideration than any  
8 other party. It is entitled to the same consideration  
9 as given to the defendant; no more and no less.

10 This case must be decided within the scope  
11 of the charges against the defendant as contained in  
12 the indictment, but before discovering the law applicable  
13 to the charges of the indictment let us consider some  
14 general principles which apply in every criminal case.

15 An indictment itself is not evidence, it  
16 merely describes the charges made against the defendant  
17 and may not be considered by you as evidence of the  
18 guilt of a defendant; Nor can the fact that a grand jury  
19 has found this indictment in any way detract from the  
20 presumption of innocence with which the law surrounds  
21 a defendant, unless and until his guilt is proved  
22 beyond a reasonable doubt.

23 Each of the 10 counts which you will  
24 consider allege the commission of a separate and distinct  
25 offense. It will be necessary for you to reach a

gta3

1 verdict of guilty or not guilty as to each count of  
2 the indictment. You must consider and weigh the evi-  
3 dence separately as to each count. The fact that you  
4 may find the defendant guilty or not guilty of one of  
5 the offenses charged should not control or influence  
6 your verdict with respect to any other offense of  
7 which the defendant is charged.  
8

9 The defendant has denied the charges in the  
10 indictment. By his plea of not guilty, the defendant  
11 has put into issue every material fact alleged in the  
12 accusations brought against him. Accordingly, the  
13 government, having made the charge, has the burden of  
14 proving beyond a reasonable doubt each material element  
15 of each count of the indictment. This burden of proof  
16 never shifts. It remains with the government through-  
17 out the entire trial and during your deliberations as  
18 jurors.

19 A defendant does not have to prove his  
20 innocence. He is presumed to be innocent, and this  
21 presumption is overcome only when you reach a conclusion  
22 from the evidence that his guilt has been established  
23 beyond a reasonable doubt.

24 Now, what is meant by reasonable doubt?

25 There is nothing mysterious about the

1 gta4

2 term. It means as the words themselves indicate,  
3 a doubt based upon reason and common sense which arises  
4 after consideration of all the evidence. Reasonable  
5 doubt is a doubt which would cause reasonable persons  
6 to hesitate to act in matters of importance to them-  
7 selves. It is not a vague, speculative, imaginary  
8 something, and a person may not be convicted on mere  
9 suspicion or conjecture.

10 On the other hand, a reasonable doubt does  
11 not exist merely because a juror does not wish to  
12 perform an unpleasant duty.

13 A reasonable doubt may arise not only from  
14 the evidence produced, but also from a lack of evidence.  
15 A defendant may also rely on evidence brought out on  
16 cross examination of any of the witnesses who have  
17 testified on behalf of the government. He may attempt  
18 to raise a reasonable doubt in your mind as to the  
19 existence of one or more of the material elements of  
20 the crime without affirmatively presenting his version  
21 of all or any of the facts. This is so because the  
22 law does not impose upon a defendant a duty to produce  
23 any evidence.

24 The law does not compel a defendant to take  
25 the witness stand, and no presumption of guilt may

be raised and no inference of any kind may be drawn from the failure of a defendant to testify.

Now, it is not necessary for the government to prove the guilt of a defendant beyond any possible doubt. Proof is usually not a matter of mathematical or absolute certainty. In the nature of things, it cannot be. But to sustain a conviction, there must be such proof as satisfies your reason as intelligent people beyond any reasonable doubt that the defendant is guilty as charged.

If you do not have a reasonable doubt of the defendant's guilt as to the material elements of a charge, then you should return a verdict of guilty on that count. If, on the other hand, you do have a reasonable doubt as to the defendant's guilt as to any of the material elements of the crime charged, then you must return a verdict of not guilty as to that count.

If the evidence is susceptible to two interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation or conclusion which will admit of the defendant's innocence

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2 and reject that which points to his guilt.

3 Now, this trial has been a short one and  
4 you have heard the assumptions of counsel in which  
5 they pointed out the various portions of the proof on  
6 which they say you should rely to render a verdict in  
7 favor of their client. I see no reason to further  
8 detail the contentions of the parties or the specific proof to  
9 substantiate those contentions.

10 Each of counts 1 through 5 of the indictment  
11 charges a separate and distinct violation of Section  
12 841(a)(1) of Title 21 of the United States Code.  
13 That section makes it a crime for any person knowingly  
14 and wilfully to possess cocaine with intent to distribute  
15 it.

16 Count 1 charges that on or about January  
17 22, 1975 the defendant James Grant unlawfully, knowingly  
18 and wilfully possessed, with intent to distribute, approxi-  
19 mately 5.38 grams of cocaine. This is the cocaine  
20 which an agent testified he found in Grant's pocket.

21 Count 2 makes the same charge as to 3.3  
22 grams of cocaine. This is the cocaine which an agent  
23 testified he found in a desk drawer in the front part  
24 of Room I.

25 Count 3 makes the same charge as to the

1 gta7

2 226.26 grams of cocaine. This is the cocaine which  
3 an agent testified he found in a desk drawer in Room  
4 II.

5 Count 4 makes the same charge as to 178.45  
6 grams of cocaine. This is the cocaine which an  
7 agent testified he found in an open cabinet in the  
8 front portion of the back room.

9 Count 5 makes the same charge as to 27.57  
10 grams of cocaine which an agent testified he found in  
11 an open jug in Room IV.

12 During the trial I preliminarily indicated  
13 that Exhibits 8 through 11 would not be admissible.  
14 I finally admitted them into evidence at the conclusion  
15 of Mr. Fernandez' testimony.

16 In order for you to return a verdict of guilty  
17 against the defendant on any of these five counts, you  
18 must be convinced that as to the count in question  
19 each of the following three elements has been proved  
20 beyond a reasonable doubt.

21 First, that the substance contained in the  
22 government's exhibit relating to the count is, in fact,  
23 cocaine.

24 Second, that on or about January 22,  
25 1975, the defendant wilfully and knowingly had in his

1 gta8

2 possession the cocaine named in the count.

3 Third, that the defendant intended to  
4 distribute the cocaine in his possession to someone  
5 else.

6 As to the first element to be proved beyond  
7 a reasonable doubt, the defendant and the government  
8 have agreed that if a chemist were called, he would  
9 testify that the substance seized in each of the five  
10 counts is cocaine.

11 The second element to be proved beyond a  
12 reasonable doubt is that on or about January 22, 1975,  
13 the defendant knowingly and wilfully had in his  
14 possession the cocaine specified in the particular  
15 count.

16 You may find that the defendant acted know-  
17 ingly and wilfully if he acted voluntarily and  
18 purposely and with specific intent to do something  
19 which the law forbids, that is to say, that he must have  
20 acted with evil motive or bad purpose to disobey or  
21 disregard the law and not because of negligence, mistake, in-  
22 advertence or other innocent reason.

23 It is obviously impossible to ascertain or prove  
24 directly what a person knew or intended. You cannot  
25 look into a person's mind and see what his intentions

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were or what he knew. But a careful and intelligent consideration of the facts and circumstances shown by the evidence in any given case as to a person's actions and statements enables us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things and the state of his knowledge.

The word "possession" as used here means not only physical possession in the sense of holding an object in one's hand or having it on one's person. The defendant may also be found to have possession of cocaine if you are convinced beyond a reasonable doubt that he had power to control its movements or distribution. This is what the law terms constructive possession.

You may find that the defendant has constructive possession of cocaine if he is sufficiently associated with the persons or things having physical custody of it so that it is able without difficulty to be produced for a customer.

However, mere presence in an area where narcotics are discovered is not sufficient in itself for finding possession. The key to possession is dominion and control over the cocaine.

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The third element which must be proved beyond a reasonable doubt is that the defendant knowingly and wilfully intended to distribute the cocaine in his possession to someone else.

Now let us turn to the offenses charged in counts 6 through 10.

Each of these counts charges a violation of Section 924(c)(1) of Title 18 of the United States Code, which makes it a crime to use a firearm in the commission of another crime which is a felony.

You will consider whether the defendant is guilty of any or all of these counts only if you have found him guilty of possessing cocaine with intent to distribute it under one or more of counts 1 through 5.

If you have acquitted the defendant of all counts 1 through 5, then you must acquit him of the charges contained in counts 6 through 10.

Count 6 charges the use of a Dan Wesson .357 Magnum revolver. An agent testified that he found this revolver in a credenza in the rear portion of Room I.

Count 7 charges the use of a Winchester Model 94, .30/.30 caliber rifle. An agent testified that

gtall

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he found this rifle under cushions of a couch in the rear portion of Room I.

Count 8 charges the use of a Remington .45 caliber semiautomatic pistol. An agent testified that he found this pistol in the drawer of a desk in the rear portion of Room I.

Count 9 charges use of a Plainfield .30 caliber semiautomatic rifle. An agent testified that he found that rifle in the back of a couch in Room I.

Count 10 charges use of a Strum Ruger .357 Magnum revolver. An agent testified that he found this revolver in a desk drawer in Room II.

As to each of these counts, the government must prove two elements beyond a reasonable doubt.

The first element is that the firearm specified in the count must have been used by the defendant in some manner to enable him to commit the crime of possessing cocaine with intent to distribute it.

The second element is that he have done so knowingly and wilfully.

Now, as to the first element, the defendant must have used the firearm alleged in the count. When I say "used," I do not imply that the firearm had to be

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fired or even necessarily carried but only that the defendant had the firearm to further the commission of the crime of possessing cocaine with intent to distribute it. In this connection, you may infer, if you wish, that the firearms were used to aid the defendant in his possession of the cocaine with intent to distribute.

As I have said, you may draw this inference to satisfy this element of the crime. However, if you decide not to draw the inference, then you should acquit the defendant on these counts.

I have already defined for you what is meant by knowingly and wilfully and that definition applies equally as well to these counts.

Coming back to counts 1 through 5, if you acquit the defendant on any or all of these counts, this does not complete your task as to those counts. Even though the defendant has been charged in the indictment in such counts with possession with intent to distribute cocaine and you have acquitted him of such charge, you may still find the defendant guilty of any counts of which you have acquitted him if you find that he merely had knowing possession of the cocaine without intent to distribute it.

1                   gtal3  
2                   This is a doctrine which the law calls  
3           lesser included offense.       Thus, as to any such count,  
4           if you find beyond a reasonable doubt that the sub-  
5           stance specified in the count is cocaine and that the  
6           defendant knowingly possessed it not having a valid medical  
7           prescription, and that he possessed it without intent  
8           to distribute, then you would find the defendant guilty  
9           of simple possession under that count.

10                   When you return your verdict and if you  
11           state that the defendant has been found guilty of  
12           any of the counts 1 through 5, you will be asked whether  
13           he is guilty of possession with intent to distribute  
14           or mere possession.

15                   Finally, as I have already told you, you  
16           may find the defendant guilty of any of the counts  
17           numbered 6 through 10 only if his guilt has been found  
18           under one of the counts 1 through 5 based on a finding  
19           that he possessed the cocaine with intent to distribute  
20           it.

21                   Now, in determining the guilt or innocence  
22           of a defendant you must decide that question solely  
23           from the evidence you heard from the witness stand  
24           and the exhibits that have been placed before you.

25                   The summations of counsel which you have

1 heard are not to be considered as evidence but only  
2 as arguments to you as to what counsel feel you  
3 should find from the evidence. In determining the  
4 issues in this case it is your recollection of the  
5 testimony that is to control and not that of counsel  
6 or the court.  
7

8 If during the course of the trial I  
9 sustained an objection by one counsel a question asked  
10 by the examining counsel, you are to disregard the  
11 question and any alleged facts contained in the  
12 question and you may not speculate as to what the  
13 answer would have been.  
14

15 There are, generally speaking, two types  
16 of evidence from which a jury may properly find the  
17 truth as to the facts of the case. One is direct  
18 evidence, such as the testimony of an eyewitness.  
19 The other is indirect or circumstantial evidence,  
20 which is the proof of a chain of circumstances pointing  
21 to the existence or nonexistence of certain facts.

22 Circumstantial evidence is the proof of facts  
23 from which you may reasonably infer a material element  
24 of a crime.

25 Let us take one simple example to illustrate  
what is meant by circumstantial evidence. We will

1 assume that when you entered the courthouse this morn-  
2 ing the sun was shining brightly outside, it was a  
3 clear day. There was no rain.

4  
5 Now assume in this courtroom the blinds are  
6 drawn as they are, the drapes are drawn and you cannot  
7 look outside. Assume as you are sitting here in this  
8 jury box, and despite the fact that it was dry when you  
9 entered the building, someone walks in with an umbrella  
10 dripping water, followed in a short time by a person  
11 wearing a raincoat which is wet.

12 If you are asked whether it is raining now,  
13 you cannot say that you know it directly or of your  
14 own observation, but certainly upon the combination of  
15 facts which I have stated to you, even though when you  
16 entered the building it was not raining outside, it would  
17 be reasonable and logical for you to conclude that  
18 it is raining now.

19 That is about all there is to circumstantial  
20 evidence. You may draw such inferences as reason  
21 and common sense lead you to draw from facts which you  
22 find have been proven. Great care must be exercised when  
23 drawing inferences from circumstances proved in criminal  
24 cases and mere suspicions will not warrant a convic-  
25 tion.

1  
2 However, no greater degree of certainty is  
3 required of circumstantial evidence than is required  
4 of direct evidence. It is not on any different or  
5 lower plane than direct evidence. The law simply  
6 requires that in either case you must be convinced  
7 beyond a reasonable doubt of the guilt of a defendant.

8 In your search for the truth you must use  
9 plain, everyday common sense. You must not be governed  
10 by sympathy, bias or prejudice.

11 You have seen the witnesses on the stand  
12 and observed their manner of testifying. How did the  
13 witnesses impress you? Did they appear to be testify-  
14 ing fairly, candidly and frankly?

15 In determining what degree of credit you  
16 should give a witness' testimony you may consider his  
17 conduct, his manner of testifying and his interest in  
18 the outcome of the trial. You should also consider  
19 his relationship to the government, his bias or im-  
20 partiality and any motive he may have to testify falsely.

21 It does not necessarily follow, of course,  
22 that because a person is interested in the result he  
23 is incapable of telling a truthful version of an  
24 occurrence.

25 If you believe that a witness wilfully

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testified falsely as to any material fact, you may disregard his testimony altogether or you may accept that part of his testimony which you believe worthy of credence. What you accept or reject as credible evidence is for you to determine, but you may not go outside of the evidence to speculate as to the facts.

The quality of the testimony of the particular witness, regardless of who calls them, rather than the quantity of witnesses is the test to be used in arriving at your decision.

You should consider a witness' entire testimony, his direct examination, his cross examination and his redirect examination. You should consider the strength or weakness of his recollection in the light of all the testimony and attendant circumstances in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit the testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an unusual experience.

In weighing the effect of a discrepancy,

1           gtal3  
2           consider whether it pertains to a matter of importance  
3           or to an unimportant detail and whether the discrepancy  
4           results from innocent error or wilful falsehood.

5                   You may call for any exhibits which you  
6           desire to see in conjunction with your deliberations.  
7           You may call for a reading of any portion of the offi-  
8           cial transcript of the evidence or any portion of this  
9           charge.

10                   You are instructed that the question of  
11           possible punishment of a defendant in the event of  
12           conviction is no concern of the jury and should not in  
13           any sense enter into or influence your deliberations.

14                   The duty of imposing sentence in the event  
15           of a conviction rests exclusively upon the court.  
16           The function of the jury is to weigh the evidence in  
17           the case and determine the guilt or innocence of a de-  
18           fendant solely upon the basis of such evidence.

19                   I have sought to avoid any comments which  
20           might suggest that I have personal views on the evidence  
21           or that I have any opinion as to the guilt or innocence of  
22           the defendant and you are not to assume that I have any  
23           such views or opinion.

24                   This charge is given to you solely to  
25           instruct you as to the law applicable to this case.

1           The actions of the judge during the trial in granting  
2           or denying motions or ruling on objections by counsel  
3           or in statements to counsel or in attempting to clearly  
4           set forth the law in these instructions are not to  
5           be taken by you as any indication of any determination  
6           of the issues of fact.     These matters, the actions  
7           of the court, relate to procedure and law.     You, the  
8           members of the jury, determine the facts.  
9

10                 There are 12 members of this jury and all  
11           of you must agree upon any verdict you reach as to any  
12           count in the indictment.

13                 This case is obviously an important one to  
14           the defendant; it is equally important to the govern-  
15           ment.     I am submitting it to you in complete con-  
16           fidence that you will comply with your oath as jurors  
17           and decide the case fairly and impartially and without  
18           fear or favor.

19                 If there are any exceptions to the charge,  
20           I will take them in the robing room.

21                 Mr. Mogulescu?

22                 MR. MOGULESCU:     Yes, your Honor.

23                 (In the robing room; counsel present.)

24                 MR. MOGULESCU:     I would except to the  
25           portion of the charge where the court dealt with con-

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2 structive possession and indicated something about  
3 being able to call for contraband at will.

4 Given the facts of this instant situation,  
5 the fact that Mr. Grant may or may not have had  
6 access to the drugs, I don't think is sufficient to find  
7 that he actually possessed the drugs and I would ask  
8 for a charge along those lines, that you may find that  
9 Mr. Grant had access but --

10 THE COURT: I said he had dominion and  
11 control.

12 MR. MOGULESCU: My feeling is that that  
13 was not made clear to the jury, that it is possible  
14 that Mr. Grant either could have had knowledge that  
15 there were drugs in the place or --

16 THE COURT: I didn't say that. I said  
17 the key was dominion and control. I didn't leave the  
18 charge on merely having access.

19 MR. VISCARRONDO: In addition, your Honor --

20 THE COURT: Wait, wait.

21 I overrule your request.

22 MR. MOGULESCU: The second thing is, your  
23 Honor, in terms of the gun counts, counts 6 through 10, it  
24 would be my position that an essential element along  
25 with the elements the court laid out that any possession,

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1 since possession is inherent in the control or use of  
2 the guns -- I think you can't use a gun without posses-  
3 sing it -- that any possession -- that the government  
4 has to prove that any possession was unlawful possession  
5 under state law.  
6

7 THE COURT: No. Unlawful is for subdivi-  
8 sion 2, not subdivision 1.

9 MR. HOGULESCU: And I would request, just to  
10 supplement the charge, your Honor, that mere knowledge  
11 of the existence of the commission of a crime or knowl-  
12 edge of the existence -- if the jury finds he had  
13 knowledge of the existence of drugs, that that does not  
14 necessarily mean that the government has satisfied  
15 its burden.

16 THE COURT: I think I have covered that  
17 sufficiently in the charge.

18 What did you want to say?

19 MR. VISCARRONDO: No exceptions.

20 (In open court.)

21 THE COURT: Swear the marshals.

22 (A marshal was duly sworn.)

23 THE COURT: Mrs. Gleberman and Miss Glenn,  
24 thank you for being with us, but you do not participate  
25 in the deliberations of the jury.

1 gta  
2  
3 THE COURT: The motion is denied. That  
4 is a question for the jury.

5 MR. NOGULESCU: My application would be  
6 the same for count 2, which is 7.03 grams of cocaine,  
7 which is alleged to have been found in the desk  
8 drawer in Room No. I.

9 Once again, I think that that amount is  
10 consistent solely with possession for personal use.

11 THE COURT: The same ruling.

12 MR. NOGULESCU: As to the next counts,  
13 3, 4, 5, the cocaine charged in those counts, I move  
14 for judgment of acquittal on the grounds that the govern-  
15 ment has not proved that the defendant possessed the  
16 substances charged in that count.

17 I would cite to the court the case of United  
18 States v. Bonham, 477 F. 2d 1137, the Third Circuit,  
19 1973.

20 In that case the defendant was tried with  
21 his half brother. The police had come into the  
22 defendant's home pursuant to a search warrant and he  
23 shared the premises with his half brother and his mother  
24 and her daughter and the husband, the daughter's husband  
25 and the daughter's child, and in a bedroom, secreted

in a bedroom shared by the defendant and his half brother, the police found some heroin and it was hidden. The Court of Appeals in that case said that the evidence was insufficient:

"Here there was nothing except the joint occupancy of the room upon which an inference of possession could be based. A factfinder could only speculate whether both room occupants or a particular one of them even knew of the cache, much less exercised control over the hidden contraband."

I would indicate also, that a similar holding has been found in United States v. Stephenson, reported at 474 F. 2d 1353, which is the Fifth Circuit, in 1973.

In that case there was a warrant obtained to search the defendant and his car. There was also a separate warrant to search the premises of a bar.

The defendant arrived at the bar in his automobile. He and the car were searched and there was no contraband found. He was taken into the bar and the agents searched the bar and in a locked storage room used by the bar they found 233 envelopes of heroin. Seventeen of the envelopes had the defendant's fingerprints on them.

The court found the mere presence in the area is not sufficient and that they did not have sufficient evidence, as I recall, in that case to convict. That was a Fifth Circuit case.

So as to the other counts, all of the cocaine that was seized from rooms that the defendant was never found in, particularly in count 4, the back room, a room where another individual had a key to the room, another individual said it had been his room at some time, there is no evidence whatsoever to connect the defendant, outside of his admission that he was the manager of the club, to connect the defendant with the cocaine charged in counts 3, 4 and 5, and for that reason, your Honor, I would move for a judgment of acquittal on those counts.

THE COURT: Mr. Viscarrondo?

MR. VISCARRONDO: Yes, your Honor.

The evidence against the defendant on these three counts is simple and clear.

He was the manager of this club, he told Agent Bellini that he had control of the whole area when he came in, and Agent Bellini asked him, "Are you the manager of this whole club?"

When Agent Bellini first saw him he was

2 walking from the back area of the club.

3 The defendant's keys were the keys that  
4 unlocked rooms to I, II and III. In addition, this  
5 handyman or janitor who had a key to one of the locks  
6 to the back room by the kitchen could not open the door  
7 any more. There was an additional lock on it.

8 There is absolutely no evidence in this  
9 case that anyone else had access to these rooms other  
10 than the defendant, and whatever evidence there is the  
11 jury can clearly find that the defendant was the only  
12 person who had access to the rooms and control of the  
13 rooms. I think there is clearly sufficient evidence  
14 to show that the defendant had constructive possession  
15 of the cocaine in each of those rooms.

16 THE COURT: I will deny the motion.

17 MR. MOGULESCU: Your Honor, as to  
18 counts 6 through 10, the superseding indictment, which  
19 is somewhat different than the -- the most recent super-  
20 seding indictment is different.

21 THE COURT: That is the only one we are  
22 dealing with.

23 MR. MOGULESCU: Yes. In this indict-  
24 ment the defendant is charged with unlawfully, wilfully  
25 and knowingly did use the firearms hereafter set forth

in counts 6 through 10 to commit felonies for which he may be prosecuted in a court of the United States.

There is no evidence whatsoever as to use of those firearms.

Congress, when it drafted 924(c), set out two separate provisions in that Act, (c)(1), which deals with the use of firearms, (c)(2), which deals with carrying a firearm during the commission of a felony.

It is my position, your Honor, that Congress, in setting out those two separate sections, indicated that it should have the meaning that it normally has in the law and general usage and to use something as distinguished from carry or possess something during the commission of a crime.

I would indicate, your Honor, in *United States v. Ramirez*, 482 F. 2d 807, Second Circuit, 1973, there is a paragraph, although the case goes off, the case itself was dealing with (c)(2), 924(c)(2), the circuit was dealing with that, on page 814 there is the following paragraph:

"Thus, the legislative history plainly shows that carrying a firearm without using it during the commission of a federal felony violates Section 924(c)(2) only if possession of the firearm itself is unlawful.

2 The court obviously recognized the  
3 distinction between carrying or possession and use.

4 In this case Mr. Grant is charged with use  
5 of the firearm. That is the count that is set forth  
6 in the indictment, that is what the government chooses  
7 to charge him with. There is no evidence whatsoever  
8 in this record that Mr. Grant used any of those fire-  
9 arms.

10 THE COURT: Mr. Viscarrondo.

11 MR. VISCARRONDO: Your Honor, as to the  
12 last six counts, I will admit that the law is quite  
13 ambiguous and scant on this statute. I have  
14 been able to find no cases applying to (c)(1) and the  
15 legislative history isn't very helpful in this regard  
16 either.

17 But what we suggest is that use should be  
18 given a common-sense, broad interpretation so that the  
19 statute can be applied consistently with the aims of  
20 Congress.

21 As Mr. Mogulescu has pointed out, 924(c)  
22 is divided into two sections, (1) and (2). (2) makes  
23 it a crime to carry firearms during the commission of  
24 a felony. (1) makes it a crime to use a firearm  
25 to commit a felony.

1                   qta  
2                   Now, what we think that (c)(1) was  
3                   clearly aimed at was an individual who had a gun,  
4                   who uses a gun in order to perpetrate a federal crime,  
5                   and this does not mean necessarily firing the gun,  
6                   because if that were the case there would be no need  
7                   for (c)(1) since such a situation would be covered by  
8                   (c)(2).

9                   For example, a very common example of the  
10                  type of crime that (c)(1) probably was directly aimed  
11                  at was a man who walks into a bank, takes out a gun  
12                  and says, "Give me your money, this is a holdup,"  
13                  without firing the gun."

14                 Clearly that comes within (c)(1) and that  
15                 is use.

16                 In this case I think that there is enough  
17                 evidence for the jury to find on the basis of all the  
18                 circumstances of this club, the doors, the cameras, the  
19                 large amount of cocaine and cutting material and  
20                 narcotics-related paraphernalia, that this defendant  
21                 had these guns here in order to protect his stash, had  
22                 these guns here because he knew he had something illicit  
23                 and valuable, and that he needed these guns to pro-  
24                 tect it, and therefore he used the guns within the meaning  
25                 of the statute to commit the federal felony of possession

1 gta

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2 with intent to distribute.

3 MR. MOGULESCU: Your Honor, if I may just  
4 respond very briefly, I agree with Mr. Viscarrondo that  
5 if somebody goes into a bank with a gun and says, "Give  
6 me all your money," that that is precisely the use that  
7 Congress was dealing with in Section (1), use, that  
8 is the use of a weapon to commit a felony.

9 As I indicated before, whether these guns --  
10 and we can't speculate, I don't think it is permissible  
11 at this time to speculate what the guns were there for --  
12 there is no evidence of use of the weapons. There  
13 were no armed guards marching back and forth with the  
14 weapons. All of the weapons were secreted in various  
15 desk drawers, under couches. There could have been  
16 possession whether or not there were the weapons  
17 there. The weapons didn't facilitate the possession,  
18 the weapons were not used for the possession, the pos-  
19 session is entirely separate.

20 When Congress said "use," I agree with the  
21 government that they meant use, and I don't think there  
22 is any other way to look at the statute, otherwise  
23 there would be no reason for Section (2) of the statute.

24 THE COURT: I started out in preparing  
25 for this trial and, frankly, agreed with your point

2 of view, Mr. Mogulescu, but as I worked on your motion  
3 to sever the first counts from the second I was led  
4 down another path and I can't get away from what seems  
5 to me the logical conclusion of the cases I cited denying  
6 your severance.

7 In United States v. Cannon, which is a Ninth  
8 Circuit case, at 472 F. 2d 145, the court said it may  
9 reasonably be inferred that an armed possessor of drugs  
10 has something more in mind than mere personal use.

11 That was said in relation to the admission  
12 of testimony on a charge of possession with intent to  
13 distribute that the defendant had a gun.

14 If it is admissible to show that a  
15 defendant had a gun to prove possession with intent to  
16 distribute, the only inference that can be drawn is that  
17 the gun is being used to commit the felony, because if  
18 it is no relation to the felony it should be inad-  
19 missible.

20 There is another case in the Second Circuit  
21 called U. S. v. Ravich, 421 F. 2d 1196, where they  
22 allowed the admission of six weapons found on a defendant  
23 at the time of his arrest to prove that he was the person  
24 who held up a bank some time before when only three guns  
25 were in evidence.

1  
2 If that evidence can come in to prove the  
3 identity of the person committing the bank robbery,  
4 why can't it come in to prove that the gun was used in  
5 the commission of a crime? Otherwise it shouldn't  
6 come in.

7 MR. MOGULESCU: Your Honor, my response  
8 would be that in construing a penal sanction, the courts  
9 have consistently held that there should be a strict  
10 conduct, basically, of sanctions that set out crimes.

11 There are cases, the Ramirez case is one,  
12 that finds clearly -- just bear with me for a moment  
13 and I will give you another citation -- it is clear  
14 that the courts have held that 924 sets out separate  
15 crimes.

16 THE COURT: True.

17 MR. MOGULESCU: My position is that in  
18 order to prove those separate crimes -- it is not the  
19 same as the possession and whether or not the guns  
20 may be admissible to show possession with the intent  
21 to distribute --

22 THE COURT: Let me ask you, if the court  
23 allows in the evidence of the gun in the possession of  
24 the defendant to prove possession with intent to  
25 distribute, what is the reason for it?

The reason can only be that that gun is necessary for the commission of the crime.

MR. HOGULESCU: I respectfully disagree with the court, because there are other substances that also come in.

THE COURT: Let me read what the Ninth Circuit has said:

"It may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use.

"It is the gun that proves possession with intent to distribute, and the reason it proves possession with intent to distribute is because it is used to protect the possessor from being ripped off, it protects him in distributing his narcotics."

Now, I admit that this case is not as strong as the thermometer case where the Second Circuit has said that the admission of the thermometers, albeit after the completion of the conspiracy, can show that you were dealing in something that was necessary to determine the narcotic that you were using; similar scales.

MR. HOGULESCU: But as I get back to my position, Judge, my position is that Congress, in using "use," had a particular thing in mind.

1                   gta  
2                   The use that you set out, the use to protect  
3                   the drugs, is not, to my mind, the kind of use that  
4                   was envisioned, and I think to a certain extent what  
5                   the Second Circuit suggested in U. S. v. Ramirez was  
6                   not the intent indicated by Congress. Congress was  
7                   arguing the use of a weapon going into a bank or any  
8                   other of the series of federal crimes where a weapon  
9                   could be used to commit a particular crime.

10                   You have to read, I think -- although it  
11                   is read in the "or," Section (1) and Section (2) to-  
12                   gether, Section (2), which makes it a crime to carry  
13                   a firearm unlawfully during the commission of --

14                   THE COURT:        I assume unlawfully it is  
15                   not a licensed weapon.

16                   MR. MOGULESCU:       But what I am saying  
17                   is that Congress set that out as a different section  
18                   of the crime than the use section, the carrying of a  
19                   firearm unlawfully being different than the use of a  
20                   firearm.

21                   In this situation, if anything, you have  
22                   the carrying of a firearm and the possession of a  
23                   firearm.

24                   THE COURT:        I am afraid I am going to let  
25                   it stand.        I think it is close, but if by any chance

1 gta

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2 your client is convicted, you have a clear appellate  
3 question and they are going to have to determine it.  
4 All I can do is draw conclusions from what they have  
5 done on allowing in gun testimony.

6 MR. HOGULESCU: If I may -- I don't want  
7 to push the point too much -- but in the situation in  
8 Ramirez, where the defendant was convicted with others  
9 in a conspiracy to possess and distribute narcotics,  
10 the defendant there at the time of his arrest, evi-  
11 dently, or during the course of some of the transactions  
12 that gave rise to the conspiracy charge was found to  
13 be in possession of a pistol and he was charged there  
14 under Section (2). But I think the facts are pretty  
15 much the same. I mean, in terms of the kind of  
16 possession.

17 He had a gun with him during the various  
18 discussions and things that went on in furtherance  
19 of the conspiracy, much like the analogy of the situa-  
20 tion that you indicated where the Ninth Circuit said,  
21 well, the possession of the guns, they were there for  
22 something and they are certainly admissible on the ques-  
23 tion of intent to distribute, the possession of the guns.  
24 That may be.

25 I am just trying to stress for the court

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2 the distinction that I see in my mind between  
3 evidence that comes in that may bear on the question  
4 of intent and evidence that is unlawful as such --

5 THE COURT: If it bears on intent, it can  
6 only bear on intent because the gun is going to be used  
7 in the commission of the felony, it is necessary.

8 MR. MOGULESCU: Then I don't understand  
9 why Ramirez -- it is not the court's doing that he was  
10 charged under a particular section of the law rather  
11 than another section of the law, but it just seems  
12 to me the reading that the court is giving under the  
13 statute is setting up in fact a third category, not the  
14 (c) (1) or (c) (2).

15 THE COURT: As I said, if I am wrong, I  
16 think you have clearly made the position and the  
17 Court of Appeals can obviously disagree with me if we  
18 have a conviction in this case.

19 The motion is denied.

20 Do you have any proof you want to offer,  
21 Mr. Mogulescu? Are you resting now?

22 MR. MOGULESCU: Your Honor, I am going  
23 to call one witness.

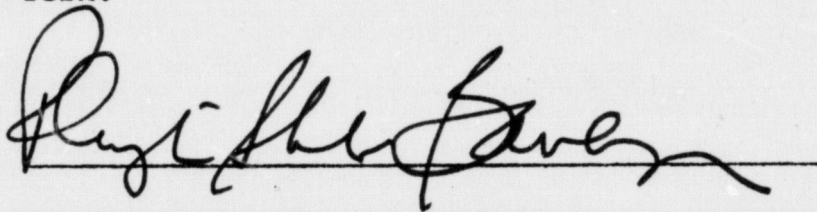
24 THE COURT: All right.

25 Bring the jury back.

CERTIFICATE OF SERVICE

FEBRUARY 10, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

A handwritten signature in cursive script, appearing to read "Elizabeth A. Davis", written over a horizontal line.